FOR ARGUMENT

No. 98-83

In The

Supreme Court of the United States

October Term, 1998

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

Petitioners,

vs.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

I. RESPONDENTS CAN MAKE NO REASONABLE ARGUMENT THAT THEIR CONDUCT COMPLIED WITH THE FOURTH AMENDMENT

Respondents advance two lines of argument in an effort to defend the constitutionality of their decision to bring the media into a private home without either the consent of the homeowners or the authorization of a neutral magistrate. The first argument is categorical – that the Fourth Amendment is not even implicated in this case because the media saw nothing more than the police were authorized to see in the course of executing the warrant. Their backup argument is that any additional intrusion caused by the media in this case was negligible and counterbalanced by a variety of benefits to the overall "mission" of law enforcement. Both arguments should be firmly rejected.

A. Fourth Amendment Protection Against Unreasonable Intrusions Into The Home Does Not Disappear Because of A Reasonable Intrusion

Respondents'. case is built on the assumption that Fourth Amendment protection of the home against unreasonable intrusions vanishes once a government official establishes a constitutional foothold inside. According to respondents, "the media's observation of [Mr. Wilson in his underpants and Mrs. Wilson in a sheer nightgown] did not result in any incursion on their privacy that differed in any material respect from the invasion that accompanied respondents' entry into the house. On the contrary, respondents and the media saw *exactly the same scene*." State Resp'ts Br. at 15 (emphasis added). Under respondents' constitutional regime, anyone and everyone – no matter for what purpose – can be invited into a

private home, just so long as they are restricted to seeing "exactly the same scene" a government official is entitled to see. Media observation of a strip search would be lawful under this "exactly the same scene" theory of Fourth Amendment protection since, as respondents argue, "a privacy interest, once extinguished by a legitimate intrusion, will not form the basis for a new and different Fourth Amendment violation." State Resp'ts Br. at 16-17.

Respondents' argument proves too much. By cobbling together the plain view doctrine and the "legitimate expectation of privacy" standard, they assume away all privacy interests of the occupants of a home so that one need not ask whether a subsequent intrusion was "reasonable," one need merely ask whether the subsequent intruder saw only what was seen during the course of the initial, reasonable intrusion. If the answer is yes, then the Fourth Amendment does not apply – the subsequent intruder could not have infringed a legitimate expectation of privacy. The logical consequence of respondents' argument is that no court could ever conclude that the intrusions of third parties "to observe and record" is unreasonable since there are no privacy interests left for them to intrude upon. This argument would create a *per se* rule that permits the police to bring the media to observe and record any authorized search or seizure without having to satisfy the Fourth Amendment's requirement of reasonableness. This cannot be a correct reading of the Constitution.

This Court, moreover, has recognized that the Fourth Amendment requires analysis of the purpose of a search, and that an intrusion for one purpose does not somehow destroy all reasonable expectations of privacy. Thus, the Court has repeatedly held the nature and scope of a

search must be reasonably related to the purposes of the search. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1984) ("Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive. . . . "). Here, respondents' decision to invite the media into petitioners' home significantly broadened the scope and intensified the intrusiveness of the search for reasons that were entirely unrelated to the purposes of the warrant. This Court also rejected respondents' all-or-nothing approach to Fourth Amendment protection when it held that the government's right to enter an employee's office for work-related reasons does not extinguish all privacy claims when it enters the employee's office for law enforcement reasons. Indeed, in *O'Connor v. Ortega*, 480 U.S. 709 (1987), decided five years prior to the events that gave rise to this lawsuit, every Member of the Court agreed that:

> Constitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.

480 U.S. at 729 (Scalia, J., concurring in the judgment); *id.* at 717 (plurality opinion); *id.* at 738 (Blackmun, J., dissenting).

Respondents' belittling of the privacy invasion occasioned by bringing the media into people's homes – particularly, as here, when the occupants were expected to be in bed – is unjustifiable and disquieting. Given the media's power to disseminate information and images far and wide, without any governmental restraints, bringing them into a private home is particularly destructive of privacy, and runs counter to basic notions of what privacy ultimately entails – the ability to control when and

how and to what extent information about one's self is disclosed to others. *See, e.g.*, Adam Carlyle Breckenridge, *The Right to Privacy* 1 (1970) ("Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. . . . It is also the individual's right to control dissemination of information about himself"); Alan F. Westin, *Privacy and Freedom* 7 (1967) ("Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others"); *Webster's Third International Dictionary* 1804 (1981) (defining "privacy," in part, as "freedom from unauthorized oversight or observation").

The Framers were also concerned about the divulgement of information that searches entailed. From the time of *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), to the time of the Fourth Amendment's adoption, "opinion on search and seizure had moved beyond [general] warrants to derivative and deeper issues. The underlying theme of [the *Wilkes Cases*] in the 1780's was that general warrants were wrong not just because they permitted general searches but because searches threatened privacy." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1547-48 (1990).

Respondents attempt to justify the media intrusion in this case by arguing that members of the public were originally allowed to effectuate or assist in felony arrests, for example, as a *posse comitatus*. *See* Fed. Resp'ts Br. at 26-30. This argument is inapposite – respondents concede that the media in this case did nothing to assist in executing the warrant. *Id.* at 4, 6. At common law, "[t]he party taking upon him to execute process, whether by writ or warrant, *must be a legal officer for that purpose, or an assistant to such.*" 1 Edward Hyde East, *East's Pleas of the*

Crown 312 (1803) (emphasis added). The common law recognized no right for legal officers to bring third parties into a home under the authority of a warrant when their presence had nothing to do with the execution of that warrant. Respondents have pointed to no common law tradition to the contrary.

Moreover, the public character of a felony arrest provides no justification for invading the privacy of petitioners. Charles and Geraldine Wilson were not named in the warrant or suspected of any wrongdoing. Their son was not present when the police entered the home, and no arrest occurred. The fact that the names and photographs of the Wilsons were not published was due to the independent editorial judgment of the newspaper. Respondents did not do – and legally could not have done – anything to stop the newspaper from publishing embarrassing private information about the Wilsons if it had chosen to do so. The newspaper remains in possession of the photographs and can choose to publish them at any time. Under these circumstances, respondents' cavalier disregard for the Wilsons' privacy can find no support in historical practices regarding felony arrests.[1]

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[1] Respondents, in fact, would have been liable as trespassers at common law for entering the Wilson home and not finding Dominic there. *See* 2 Sir Matthew Hale, *The History of the Pleas of the Crown* 117 (1678) (Official attempting to execute warrant for felony arrest at house of another "must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger, whose house it is"). Dominic Wilson did not live at his parents' house in Rockville, Maryland. He lived in Kensington, Maryland. Court of Appeals Joint Appendix ("C.A.J.A.") at 77, 94, 95. Contrary to respondents' description of the facts, Dominic's brother was never asked and never told respondents where Dominic lived, might be found, or that Dominic had been at his parents' house the night before.

In any event, "the fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770 (1989) (quotations omitted). In *Reporters Committee*, the Court held that the disclosure of the contents of an FBI rap sheet could reasonably be expected to invade personal privacy under the Freedom of Information Act and rejected as a "cramped notion of personal privacy" an argument similar to the one respondents present here – that since the contents of the rap sheet had been previously disclosed to the public, the privacy interest at stake "approache[d] zero." 489 U.S. at 762-63. The Court concluded that "[t]he privacy interest in maintaining the practical obscurity of rap-sheet information will always be high." *Id.* at 780.

B. A Reasonable Officer Could Not Have Believed That the Fourth Amendment Authorized Bringing the News Media Into Petitioners' Home

The question here is not whether the Wilsons had a "legitimate expectation of privacy" vis-á-vis third parties seeing what respondents saw, but rather whether – given the fact that the Fourth Amendment applies to the Wilson home (and hence the Wilsons at all times had a legitimate expectation of privacy therein) – respondents' actions in facilitating the media's intrusion into the Wilson home for the purpose of gathering information and photographic images for publication in *The Washington Post* were reasonable. For an intrusion into a home to be

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C.A.J.A. 76-77. Moreover, this entire episode could have been avoided if the common law knock-and-announce requirements had been followed. *See* Hale at 116-17.

reasonable, it has to be authorized by a warrant (or one of the carefully delineated exceptions to the warrant requirement, none of which is at issue here). *See Payton v. New York*, 445 U.S. 573, 575 (1980) ("Fourth Amendment . . . prohibits warrantless and nonconsensual entry. . . . "). So, the constitutional question is whether the warrant authorized respondents to facilitate the media's intrusion into the Wilson home. The qualified immunity question is whether a reasonable officer could have believed that the warrant authorized respondents to facilitate the media's intrusion into the Wilson home.

Although respondents accuse us of contending otherwise, we agree that a warrant implicitly authorizes an officer to take reasonable steps that are not spelled out in the warrant but which are related to accomplishing the warrant's purpose, including bringing private citizens along to help.[2] *Dalia v. United States*, 441 U.S. 238 (1979), explains that the *manner* in which an authorized search is conducted is always subject to later judicial scrutiny as to its reasonableness. This assessment of reasonableness, however, is not cut free from the mooring that the warrant's purpose provides. It was well-settled prior to April 1992, for example, that "any destruction [of property] caused by law enforcement officers in the execution of a search or arrest warrant must be necessary to effectively execute that warrant." *Ginter v. Stallcup*, 869 F.2d 384, 388

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[2] Respondents are thus incorrect when they accuse us of seeking a "*per se* rule against third parties accompanying officers into a residence to execute a warrant," Fed. Resp'ts Br. at 21, and as contending that "officers executing an arrest warrant are constitutionally disabled, upon entering a residence, from taking actions that are not expressly authorized by the warrant and that would violate the common law." Fed. Resp'ts Br. at 30. We are not seeking or contending such things.

(8th Cir. 1988); *see Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982) ("destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment"). In *Dalia*, the Court found that an electronic surveillance order particularly describing the premises to be bugged did not have to "make explicit what *unquestionably is implicit* in bugging authorizations: that a covert entry . . . may be necessary for the installation of the surveillance equipment." 441 U.S. at 258 (emphasis added).

Similarly, *Payton v. New York* found that an arrest warrant "implicitly carries with it the *limited authority* to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603 (emphasis added). And, in *Michigan v. Summers*, 452 U.S. 692 (1981), it was recognized that officers executing a search warrant for contraband had implicit, limited authority to detain occupants of the premises while the search was being conducted. The detention was justified by: (1) legitimate law enforcement purposes (safety of the officers and prevention of flight) and (2) articulable and individualized suspicion that the detained person harbored contraband. 452 U.S. at 705.[3]

These cases stand for the proposition that officers may take actions that are not spelled out in a warrant, but which are reasonable in accomplishing the warrant's purpose. But in this case, respondents have repeatedly and explicitly conceded that the media's presence had nothing whatsoever to do with accomplishing the arrest of

[3] Before finding that the limited detention was constitutional based on the foregoing factors, the Court was careful to note that it was "necessary to examine both the character of the official intrusion and its justification." 453 U.S. at 701-02.

Dominic Wilson. *See, e.g.*, State Resp'ts Br. at 26 ("the media properly did not assist respondents in the actual execution of the warrant"); Fed. Resp'ts Br. at 9 ("[t]he newspaper personnel did not actively participate in executing the arrest warrant"); *id.* at 20 ("they provided no immediate physical assistance to the officers in making an arrest"). Because of this critical concession, there is no occasion for the Court to perform a balancing test to determine whether it was reasonable for the private citizens to be brought into the Wilsons' home to assist in executing the warrant. That is not why they were there, and thus their presence was *ipso facto* unreasonable.

Even if we were to assume, for qualified immunity purposes, that the arrest warrant implicitly authorized respondents to do anything they wanted that was even arguably or rationally related to the much broader mission of bringing Dominic Wilson to justice and protecting themselves from harm and liability, their conduct would still not be authorized by the warrant. The media were not brought inside the Wilson home to serve purposes related to that mission nor did they serve those purposes. They were engaged in an entirely different search – a search for information and photographic images for the benefit of their employer, *The Washington Post* – a search that was not authorized by the warrant.

The only qualified immunity issue that remains is whether a reasonable officer, knowing what respondents knew,[4] could have believed that the media's intrusion was for a purpose related to accomplishing the objective

[4] *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (qualified immunity to be determined "in light of clearly established law and *the information the searching officers possessed*") (emphasis added).

of the warrant. Respondents provide an ever-growing number of *post hoc* rationalizations as to what law enforcement interests a reasonable officer might have believed were served by the media's presence. Not a single one of those interests was brought up before the district court. *See* Mem. in Support of Mot. for Summ. J. docketed Sept. 27, 1995. At the court of appeals, respondents asserted in their opening brief only that they were following a media ride-along policy whose purpose was "to promote accurate and beneficial reporting." Br. of Appellants at 18. In their reply brief they explained that media oversight leads to the deterrence of crime and police misconduct. *See* Reply Br. of Appellants at 6-7. In this court, for the first time, respondents speculate that a reasonable law enforcement officer might have believed that media presence (1) promoted officer safety and (2) fulfilled a need for an accurate record of events. The other interests respondents identify all fit under the vague, catch-all category of "law enforcement mission" (*i.e.*, (3) educating the public, (4) deterring crime and (5) deterring police misconduct).[5] These latter interests have nothing to do with the capture of Dominic Wilson and are therefore irrelevant.

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[5] Respondents repeat "law enforcement mission" like a mantra of some constitutional significance, but provide no indication as to what it means or how it can be limited. There is hardly a thing that a third party could do that does not arguably advance some purpose related to a broader law enforcement mission. The only constitutionally sound approach is to judge third-party participation in the execution of warrants by whether it is designed to advance the specific purpose that justifies the intrusion in the first place, which is precisely what the "in aid of" language of 18 U.S.C. § 3105 requires. *See* Br. of *Amicus Curiae* NASCAT at 24-25, filed in *Hanlon v. Berger*, No. 97-1927.

On the other hand, officer safety and the need for an accurate record are, as a general matter, legitimate interests that justify officers taking steps that are not spelled out in a warrant. However, in this case, no reasonable officer knowing what respondents knew could have believed those interests were served by bringing the media into the Wilson home. The record is clear that respondents could not have been relying on the media either to promote respondents' safety or to provide an accurate record of their conduct for use in later legal proceedings. Indeed, respondents' argument is belied by their own description of their relationship with the media in this case:

> "We had no control over what he was writing or recording and what she was photographing." (Olivo Aff. at 6); C.A.J.A. at 83.
>
> * * *
>
> Q. Well, the press – on April 16, 1992, they were not assisting you as law enforcement officers in any way, were they?
>
> A. No.
>
> (Collins Depo. at 157); C.A.J.A. at 119.
>
> * * *
>
> Q. They were just along, and you just didn't pay much attention to them?
>
> A. Correct.
>
> (Collins Depo. at 157); C.A.J.A. at 119.
>
> * * *
>
> "[T]he understanding between ourselves and the press was that you need to stay out of the way while we do our job." (Perkins Depo. at 59); C.A.J.A. 132.

As a general matter, with respect to the interest in officer safety, the Model Rules of Law Enforcement handbook treats media presence during the execution of a warrant as a safety risk, not a safety enhancement. Criminal Justice Council, *Model Rules of Law Enforcement: A Manual on Police Discretion* § 4.02, at 257-58 (1974). Sheriff Kight also viewed the presence of civilians during the execution of warrants as posing safety risks. C.A.J.A. 147. Respondent Perkins testified that having the media around was a safety concern and akin to a "baby-sitting type situation," with the officers serving as the baby-sitters. C.A.J.A. 130, 133. Respondents have not cited any treatises or law enforcement manuals that recommend bringing along photographers or reporters to protect officer safety when they enter private homes to effectuate an arrest.

With respect to the interest in preserving a record, we think it is fair to say that experience has shown that the media is unlikely to turn over the unpublished fruits of its newsgathering efforts so that they could be used for a government purpose. We also trust that the reasonable law enforcement officer knows this. Respondents could have created their own photographic record if they thought it served an important law enforcement role. Officers who wish to preserve a video or photographic record for evidentiary purposes would logically seek to do so by using personnel under police control and not by bringing in independent members of the news media. A reasonable officer would hardly think it worth the candle to use media personnel to preserve an accurate record that could only be obtained, if at all, after First Amendment litigation. There is no evidence of any agreement between respondents and *The Washington Post* that could lead one to conclude otherwise.

In the end, there is just no basis for a reasonable law enforcement official to conclude that media presence served any purpose related to accomplishing the objective of the warrant here. This case is thus far outside those that involve private individuals actually assisting in the execution of a warrant.

C. The Substantial Majority Of Courts Have Found That This Conduct Violates Clearly Established Law

Eight federal courts have concluded that the conduct at issue here is so clearly unconstitutional that, even in the complete absence of case law specifically saying so, qualified immunity is inappropriate.[6] Three courts have disagreed.[7] The dispute that has resulted in this 8-to-3 split is not over whether this conduct is constitutional or unconstitutional, but over whether it is clearly unconstitutional or not clearly unconstitutional. Precisely none of the judges that have addressed the qualified immunity

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[6] *See Berger v. Hanlon*, 129 F.2d 505 (9th Cir. 1997), *cert. granted*, 119 S.Ct. 403 (1998); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995); *Swate v. Taylor*, 12 F.Supp.2d 591 (S.D. Tex. 1998); *Barrett v. Outlet Broadcasting, Inc.*, 22 F.Supp.2d 726 (S.D. Ohio 1997); *Parker v. Clarke*, 905 F.Supp. 638 (E.D. Mo. 1995), *rev'd sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997); *Hagler v. Philadelphia Newspapers, Inc.*, C.A. No. 96-2154, 1996 WL 408605 (E.D. Pa. July 12, 1996); J.A. 46 (district court Dec. 4, 1995 opinion in this case); *Ayeni v. CBS*, 848 F.Supp. 362 (E.D.N.Y. 1994), *aff'd sub nom. Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995).

[7] *See* Pet. App. 1a; *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997); *Berger v. Hanlon*, No. CV-95-46-BLG-JDS, 1996 WL 376364 (D. Mont. Feb. 26, 1996), *rev'd*, 129 F.2d 505 (9th Cir. 1997), *cert. granted*, 119 S.Ct. 403 (1998).

question presented here have found this conduct to be constitutional, while a full 18 have found it to be *clearly unconstitutional*.[8]

Respondents are thus wrong when they say that "the lower courts are still divided on the underlying constitutional issue" and, more specifically, that the Eighth Circuit "split on the issue" in *Parker v. Boyer*. Br. for Fed. Resp'ts at 42; *see also* Br. for State Resp'ts at 32. The *Parker* panel never reached the constitutional issue, prompting Judge Rosenbaum to concur specially to express his view that the court *should have* reached the constitutional issue to find this conduct unconstitutional. *See Parker*, 93 F.3d at 448 (Rosenbaum, J., concurring specially) ("In my view, our jurisprudence demands a first determination of whether the claim constitutional right, in fact, exists. We have missed this required first step in the qualified immunity analysis."). The majority below also declined to address the constitutional issue and was careful to point out that it was not condoning this conduct: "We stress that we do not address whether the officers' conduct was constitutional or appropriate." Pet. App. 17a.[9]

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[8] These 18 judges include Judge Donald Russell, who dissented from the original panel opinion in this case but died before the *en banc* court's 6-to-5 vote, the 5 dissenters below, and the 12 judges on the courts listed in footnote 6.

[9] The federal respondents provide a string cite listing decisions in eight cases where government officials permitted the media to be present on private property. They then write, "In none of these cases was such conduct found to have violated the Fourth Amendment." Fed. Resp'ts Br. at 15. Notwithstanding the implication to the contrary, the Fourth Amendment was not addressed in at least four of the decisions cited. *See Rogers v. Buckel*, 615 N.E. 2d 669 (Ohio Ct. App. 1992); *Magenis v. Fisher Broadcasting, Inc.*, 789 P.2d 1106 (Or. Ct. App. 1990); *Miller v. NBC*, 187 Cal. App. 3d 1463 (1986); *Anderson v. WROC-TV*, 441 N.Y. 2d 220 (Ct. App. 1981). In a fifth case cited, *Scott v. Florida*, 559 So. 2d 269 (Fla. Ct. App. 1990), the court concluded that suppression of evidence was not an appropriate remedy but, significantly, then stated that this conclusion "should not be construed as an opinion on appellant's argument that the presence of the television crew infringed upon his right to privacy." 559 So. 2d at 272. *See also New Jersey v. Harris*, 237 A.2d 887, 889 (N.J. Super. Ct. App. Div. 1968) (denying motion to suppress but concluding that media presence "may well be a breach of proprieties and, if established may render liable those responsible for such breach."). The three other cases cited by respondents are discussed in our opening brief. *See* Pet'rs Br. at 42-44 (discussing *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W. 2d 768 (Wis. Ct. App. 1980)).

II. THE ONLY EFFECTIVE REMEDY FOR FOURTH AMENDMENT ABUSES IS A FOURTH AMENDMENT REMEDY

Respondents argue that common law remedies adequately protect against abuses of the sort presented here and that there is thus no need for the Court to find a Fourth Amendment violation. *See* Fed. Resp'ts Br. at 32-33. This is precisely the argument that the Court rejected in *Monroe v. Pape*, 365 U.S. 167 (1961), and in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). It is much too late in the day to argue that the Fourth Amendment was simply designed to fill in the gaps in the common law.[10] Respondents' argument also

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[10] The complaint in this case sought relief under both *Bivens* and 42 U.S.C. § 1983. The district court found respondents to be acting under color of federal law, not state law, and dismissed the Wilsons' § 1983 claims before discovery commenced. We think this was error. In our view, an officer can be acting under "color of state law" even if it can also be said that he was acting under color of federal law. The district court

confuses the remedy and the wrong. Not surprisingly, respondents point to no authority to support the odd notion that the existence of a constitutional right depends upon the absence of adequate non-constitutional remedies.

Furthermore, this Court already held that Federal Tort Claims Act ("FTCA") relief is not an adequate substitute for *Bivens* relief. *Carlson v. Green*, 446 U.S. 14 (1980), identified four reasons why an FTCA action is not a satisfactory substitute. First, because a *Bivens* remedy is recoverable against an individual, it is a more effective deterrent than the FTCA remedy, which is recoverable against the United States. 446 U.S. at 21. Second, the deterrent effect is weaker under the FTCA because it prohibits recovery of punitive damages. *Id.* at 21-22. Third, a plaintiff cannot opt for a jury trial in an FTCA action.[11] *Id.* at 22. Fourth, "an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward." *Id.*

With respect to this fourth point, it is important to recognize that under Maryland law, "state personnel" are immune from liability for a tort unless their actions are malicious, grossly negligent, or outside the scope of their

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treated the issue as an either/or proposition. This issue, however, remains before the district court, and the district court's order "is subject to revision at any time before the entry of judgment. . . . " Fed R. Civ. P. 54(b).

[11] At the time of the Fourth Amendment's adoption, "Americans enthusiastically embraced the role of the civil jury in government search and seizure cases." Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 14 (1997).

public duties. Md. Code Ann., Courts and Judicial Proceedings § 5-522(b) (1998). "State personnel" is defined to include "a sheriff or deputy sheriff of a county." Md. Code Ann., State Government § 12-101(a)(6) (Supp.1998).

Also, under the FTCA recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a). Respondents argue in their brief that taking people into private dwellings is part of "[t]he discretion that officers are afforded when they execute a warrant." Fed. Br. at 12. If a court accepts this argument, the Wilsons could be barred from recovery.

Finally, in the brief in support of its motion for summary judgment below, the United States argued that under Maryland trespass and invasion of privacy law respondents' conduct was privileged because they were acting pursuant to a valid arrest warrant. *See* Mem. in Supp. of Def. United States' Mot. for Partial Summ J. at 12-13. Although petitioners do not believe this argument will prevail, absent a holding from this Court that respondents violated petitioners' Fourth Amendment rights, it could prevail and leave petitioners without any remedy.

III. REVERSAL OF THE DECISION BELOW WILL HAVE NO SIGNIFICANT IMPACT ON LAW ENFORCEMENT OR PUBLIC INTERESTS

We do not dispute that, as a general matter, legitimate law enforcement and public interests may be served by having the press riding along with law enforcement officials and reporting on their activities, but we think a simple rule requiring that consent first be obtained before law enforcement officials bring the media into an area

protected by the Fourth Amendment will have no significant impact on those interests. If an individual is concerned about law enforcement abuse, that individual may consent to allowing the media to be present. As respondents and the media *amici* all accept, however, law enforcement officials can simply refrain from asking the media to accompany them when they plan to misbehave. So we do not accept that giving the police the discretion to invite the media into private homes will deter misconduct. We think it as likely that law enforcement officials will pour on the swagger when the media is around.[12]

The brief filed by the media *amici* bolsters our view that reversal of the decision below will have no significant impact on reporting. The media *amici* identify six examples of valuable reporting that they fear will be barred if the Court reverses the decision below, but their descriptions of those examples do not indicate whether the media entered any areas protected by the Fourth

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[12] Many police departments and law enforcement officials around the country frown on media ride-alongs for just this reason. *See, e.g., Profile: Citizens' Rights to Privacy Against Television Rights Under First Amendment* (CBS Evening News, Jan. 4, 1999) (reporting that fire and police departments are saying "no thanks" to camera crews and quoting San Diego Police Department spokesperson on camera as saying, "We don't want our officers playing to the cameras. We don't need that."); Michael Kelley, *Omaha Police Not on 'COPS'*, Omaha World Herald, Jan. 12, 1995, at 11SF (quoting Omaha Police Department spokesperson as saying, "The tendency in some shows is for officers to ham it up for the camera or act in a manner that's not normal."); *see also* Richard Zoglin, *The Cops and the Cameras*, Time, Apr. 6, 1992, at 62 (reporting that Chicago Police Department does not allow camera crews in squad cars).

Amendment.[13] We were only able to obtain five of the six examples cited by *amici*, but of those five we can confirm that none appeared to involve conduct that ran afoul of the Fourth Amendment. Two involved print reporters riding along with police, but reporting on events that occurred in public places.[14] A television program covered a sting operation that took place in an office run by undercover detectives.[15] Another television program showed what was purported to be a "sweat shop," but the owner of the place was interviewed on camera and (presumably) did so consensually.[16] A third television program shows homicide detectives going in and out of private dwellings but with the camera crew never following them inside.[17]

There are many ways for law enforcement officials to publicize their efforts and many ways for the media to report on those efforts without barging into homes without the occupants' consent. A simple requirement that consent first be obtained, we trust, will only marginally affect those efforts while ensuring that everyone remains

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[13] *See* Br. *Amici Curiae* of ABC, Inc., *et al.* at 5 nn.4-7.

[14] *See* Gordon Dillow, *Fuhrman's Fallout Makes Streets That Much Meaner for LAPD*, Orange County Register, Sept. 10, 1995, at A1; Jeff Leeds & Nicholas Riccardi, *Missing Molester Tracked Down*, L.A. Times, Jan. 31, 1997, at B1.

[15] *See Prime Time Live: Sorry, Wrong Number* (ABC Television broadcast, June 29, 1994).

[16] *See CNN Special Assignment: The Misery Trade* (CNN television broadcast, Dec. 5, 1993).

[17] *See ABC News Turning Point: Solving Murder Kansas City Style* (ABC television broadcast, June 29, 1994). This program also aired still shot photos of murder scenes apparently taken by police officials.

true to "the recognition of the Framers that certain enclaves . . . be free from arbitrary government interference." *Oliver v. United States*, 466 U.S. 170, 178 (1984).

IV. CONCLUSION

The decision below should be reversed and the case remanded for trial.

Respectfully submitted,

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